

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No.: 8:07-cr-00330T-30-TBM

JOHN ROBERT MILLER,

Defendant.

**DEFENDANT MILLER'S RESPONSE TO MOTION TO HAVE
ADDITIONAL COAST BANK BORROWERS RECOGNIZED AS CRIME VICTIMS
PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 3771**

Comes Now, Defendant, John Miller, through the undersigned attorney, and files this Response to the *Motion to Have Additional Coast Bank Borrowers Recognized as Crime Victims Pursuant to Title 18, United States Code, Section 3771 and Incorporated Memorandum of Law*. ("Investors' Motion").

FACTS

In 2004-2008, a number of investors ("the investors"), wishing to profit from Florida's growing real estate market, purchased investment homes being built by St. Petersburg-based construction company, CCI, Inc. ("CCI"). These investors had the option of funding the purchase of these homes using any means at their disposal. Many investors chose to take advantage of a construction to permanent loan program offered by Coast Bank ("Coast"). As part of their participation in this program, said investors agreed to pay a two point fee to American Mortgage Link, Inc. ("AML"), a Tampa-based mortgage brokerage firm. The points charged by AML were in line with the market and

were fully disclosed to Coast, the investors and to CCI. If the investors were dissatisfied with the terms offered by AML, they had every opportunity to seek other financing and in fact, many did. This part of the program was completely lawful.

Initially, AML charged one percentage point for its services. Sometime in 2004, Phil Coon (“Coon”)¹, the Executive Vice President of the Mortgage Lending Department of Coast Bank, demanded that Defendant, John Miller, increase AML's fee from one percentage point to two points and remit to him three quarters of that second point. As articulated above, this two point fee was fully disclosed to all parties and every investor was free to decline this financing option and seek other means of funding the investment. While the kickback arrangement presented by Coon was clearly unlawful and criminal in nature, it had nothing to do with any of the losses incurred by the investors. The failure of the real estate investment project and any resulting losses are the result of changing real estate market conditions. Defendants Miller’s and Coon’s unlawful agreement played no role in the failure of the project or any losses incurred by the investors. More importantly, Mr. Miller was not charged nor did he plead guilty to defrauding the investors. No such fraud took place – the investors were fully aware of the two points being charged and agreed to pay it. Mr. Miller was charged and has plead guilty to defrauding Coast by agreeing to participate in an unlawful conspiracy to pay Coon a portion of AML’s fee and thus depriving Coast of its right to the honest services of Coon.

Investors’ Motion makes repeated references to AML’s fee as “overcharging” investors, being “criminally-inflated” or “skimmed” by Coon and John Miller. Such inflammatory language is inaccurate and said characterizations distort the facts. AML

¹ Phil Coon is a defendant in related case number 8:08-cr-T-17MAP and has executed and filed a plea agreement similar to that filed in this case.

had the right to charge whatever fee it wanted and every investor had the right to refuse it and seek other financing options. The crime was not the amount of the fee charged but the manner in which a portion of that fee was later disbursed – such disbursement had nothing to do with investors' losses which were caused not by the disbursement of AML's fees but rather the by the collapse of Florida's real estate market, leaving the builder unable to finish the project and the investors with real estate holdings with deflated values.²

JUDGE KOVACHEVICH'S ORDER ("Order")

As explained by Defendant John Miller in his *Notice of Filing Order Entered in United States of America vs. Phil William Coon*, the investors filed identical motions in this case and in Coon and both cases involve nearly identical plea agreements. Investors' Motion incorrectly asserts that this court should not follow Judge Kovachevich's ruling regarding said motions. Investors suggest that Judge Kovachevich ruled as she did because she "may" have been "misled" regarding "the financial consequences of the crime in this case." This accusatory suggestion is completely baseless -- not only does it unfairly attack the integrity of the lawyers representing both Coon and the United States, but also rests on an assertion that is not reflected in Judge Kovachevich's order. There is nothing in the Order to suggest that the factual basis of the plea agreement played any role in the ruling. Judge Kovachevich very clearly articulates that her ruling is based on the fact that the offense charged by the government is limited to only one victim - Coast Bank. Judge Kovachevich, in clear and unambiguous language, articulates that the

Investor's Motion presents several emotional anecdotal references to selected victims' experiences in the aftermath of the projects' failure; none of those experiences were the result of the crime charged and none of those stories has any bearing on the legal issues presented in Investors' Motions and will not be addressed in this response.

"information filed by the government is based on defendant's participation in a conspiracy to commit wire fraud and, thereby, to deprive an entity, Coast Bank, Defendant's then-employer, of the intangible right of honest services. *The Coast Bank borrowers are not victims in this case - only Coast Bank is.*" (Emphasis added). Judge Kovachevich goes on to explain that "only the government decides what to include in an Information" and that the investors' desire that the evidence yielded by the investigation had led the government to charge a different crime, does not control what crime the government charges and who is the resulting victim of such a crime, "that decision is solely within the authority of the U.S. Attorney's office." The minor distinction in the factual basis of the two plea agreements does not, as suggested in Investors' Motion, mean that there are different facts in each case and, more importantly, it is clear that this minor distinction played no role in Judge Kovachevich's ruling.

THE INVESTORS ARE NOT VICTIMS UNDER 18 U.S.C. 3363(a)(2)

To be considered a "victim" under 18 U.S.C. 3363A(a)(2), an individual must be "directly and proximately harmed as a result of the commission" of the *crime charged*. The 11th Circuit addressed this issue in *U.S. v. Robertson*, 493 F.3d 1322 (11th Cir. 2007), and agreed with the definitions adopted by the First Circuit when it found in *United States v. Cutter*, 313 F.3d 1 (1st Cir. 2002), that "the government must show not only that a particular loss would not have occurred but for the conduct *underlying the offense of conviction*, but also that the causal connection between the conduct and the loss is not too attenuated (either factually or temporally)." *Id.* at 7 (emphasis added). Moreover, unlike the concept of "relevant conduct" used under the sentencing guidelines, restitution is by statute strictly limited to loss caused solely by the specific offense of

conviction. This point is well illustrated by *United States v. McArthur*, 108 F.3d 1350 (11th Cir. 1997), where the defendant shot someone coming out of a bar. He was acquitted of an 18 U.S.C. Section 924(c) offense, but convicted of illegally possessing a firearm pursuant to 18 U.S.C. Section 922(g). The district court awarded restitution for medical costs to the victim of the shooting. The restitution was vacated by the Eleventh Circuit because there was no victim of the firearm possession offense of which the defendant was convicted. *See also Hughey v. United States*, 495 U.S. 411 (1990) (Restitution limited to losses caused by offense of conviction). The failure of the real estate project and any resulting financial losses to the investors had nothing to do with the offense of conviction in this case - the deprivation of Coast Bank's intangible right to Mr. Coon's honest services. There is also no causal connection between any losses suffered by the investors and the offense conduct of John Miller and Coon. The project failed due to unfavorable market conditions and would have failed even if John Miller had not acquiesced to Coon's demands and refused to make the payments – none of this played any role in the builder's failure to complete the project or the inability of the investors to sell the completed homes. *Cf. United States v. Upton*, 91 F.3d 677, 686 (5th Cir. 1996) (restitution not authorized for losses caused by events other than offense of conviction). In short, the investors are not victims under 18 U.S.C. 3363A(a)(2).

WHEREFORE, Defendant, John Miller, prays that this Court deny Investors' Motion to Have Additional Coast Bank Borrowers Recognized as Crime Victims Pursuant to Title 18, United States Code, Section 3771.

I hereby certify that on November 21, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Rachelle DesVaux Bedke

James E. Felman, Esquire

Marcelino J. Huerta, III, Esquire

Alan E. Tanenbaum, Esquire

Respectfully submitted,

s/<Eddie Suarez>

EDDIE SUAREZ, ESQUIRE
LAW OFFICES OF ED SUAREZ, P.A.
1011 West Cleveland Street
Tampa, FL 33606
Telephone: (813) 229-0040
Facsimile: (813) 229-0041
Email: esuarez@suarezlawfirm.com
Florida Bar #752540